Introduction to 'Virtue and Law' symposium

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It took a while for the virtue theory penny to drop within legal theory. In the second half of the 20th century, when virtue theory was beginning to make a long overdue return to the centre stage of philosophical inquiry, both in ethics and in epistemology, legal theorists had a lot on their plate. Hart's positivism had taken on the realist's challenge, sending Anglophone legal philosophizing into overdrive, with immense impact in Italy, Spain, Latin America, and beyond. Hans Kelsen published the definitive 2nd German edition of his Pure Theory. Literature on legal argumentation and decision-making was mushrooming across the west, as where inquiries into the philosophical foundations of discrete areas of law (in particular private law, constitutional law, and criminal law). Everywhere you turned there was a new development, a new book, a new theory to be reckoned with.

So it is not surprising, that virtue theory's influence in legal theorizing did not start in earnest before the turn of the century. Neither is it surprising that this theorizing focused on the specific kinds of problems about law and the legal experience for which the resources of virtue theory could be more immediately useful. Accordingly, virtue jurisprudence developed not as much as a general legal theory that addressed *all* the traditional problems addressed by general legal theory (what is the law? what makes a particular rule a legal rule? What is the relationship between the law and the state?), but rather focused on legal philosophical problems that are opaque to traditional legal theory.

In effect, Virtue Jurisprudence, over the past two decades has concentrated on **three** main interrelated problems. **First**, it investigates how virtue theory could provide a suitable moral foundation for law (in general) and/or for some of its discrete substantive aspects (in particular, but not exclusively, criminal law). In doing so, it investigates not only law's ends and purposes but also asks whether its value could be (in some sense) intrinsic. **Second** virtue jurisprudence investigates the role played by character traits in legal reasoning and legal decision-making. **Third,** it investigates how engagement with the law by judges, lawyers, or even by those who are simply subject to the law can be considered to be an integral part of a virtuous life. That line of inquiry often takes the form of an investigation on the conditions necessary for the operation of practical wisdom (*phronesis*) in law. In all these areas, and in contrast to consequentialist and deontological approaches, virtue theory places the notion of virtue at the forefront of legal analysis.

This special issue - which is the very first journal issue devoted to virtue jurisprudence - brings together papers that belong to, and develop, each of those aspects of virtue jurisprudence, while also including articles that point to the future of virtue jurisprudence beyond the established fields of inquiry.

A first important connection between law and virtue has to do with the question of what the proper aims of law are. Solum's, Annas' and Brownlee and Child's papers address in detail this question. In his paper, 'Virtue as the End of Law: An Aretaic Theory of Legislation', Lawrence Solum articulates an aretaic theory of legislation according to which the aim of law is to promote human flourishing. This requires that the law aim at promoting the preconditions of human flourishing, i.e., peace and prosperity, facilitating the development

and acquisition of the virtues, and establishing the conditions under which citizens can engage in rational and social activities that express the human excellences.

Solum's aretaic theory of legislation draws on an Aristotelian theory of virtue, which is the kind of virtue theory adopted by most legal scholars working in the field of virtue jurisprudence. In contrast, Julia Annas in her essay, 'Plato on Law Abidance and a Path to Natural Law' explores the connection between virtue and the ends of law by deploying Plato's version of virtue theory. Annas argues that in *The Laws* Plato advances the idea that citizens should both think of themselves as the slaves of the law and understand their laws as well as their point, to wit, a life that is lived virtuously and thus happily. Hence, law is in this view, a blend of command and persuasion. Annas' essay concludes by suggesting that Plato's ideas on law, obedience to law, and the contribution of obedience to law to the citizen's virtue lead him in the direction of natural law. Annas' article has thus a bearing on current debates over the role of coercion in law as well as over the nature of law, thereby illustrating what has been a major benefit of the virtue turn in different disciplines, namely, the enablement of a productive dialogue between contemporary and ancient theory.

Both Solum's and Annas' essays endorse a positive view about the possibilities for the law to develop virtue among the citizens. This view is subject to close scrutiny in Kimberley Bronwlee and Richard Child's essay 'Can the Law Help us Be Moral?' Brownlee and Child give a mixed response to the question that is the target of their essay: the law, argue Bronwlee and Child, has the potential to help us to be more virtuous through its instructions, the examples it sets, and its motivational power. Furthermore, the law might not only have instrumental moral value, but it also has the potential to have intrinsic moral value, e.g., to instantiate virtue irrespective of any further ends to which it may contribute. However, they contend, there is nothing necessarily moral about the law and following its directives offers no guarantee that we will act virtuously. The law's possession of both instrumental and intrinsic moral value is conditional on the nature of the particular legal system in question.

Besides the connection between law, virtue, and law-abidingness, recent work in virtue jurisprudence has also intended to examine adjudication through the lens of virtue theory. This body of work has brought to light some dimensions of legal argument that have been at the periphery of standard theories of legal reasoning, such as the role of perception, emotion, and imagination in legal reasoning and the relevance of specification and description to legal argument. Some of these themes are picked up and developed in some of the papers of this special issue.

A prominent account of virtue takes virtue to involve a sort of perceptual capacity. On the so-called perceptual model of virtue, virtue is but an ability to perceive the salient features of a situation or what really matters in a specific case. The virtuous person's judgment results, on this view, from a distinctive way of seeing a situation. Perceptual abilities are widely considered to be central to explaining virtuous behavior – regardless of whether one endorses straightforwardly a model of virtue that identifies virtue with a fine-tuned perceptual capacity. Little attention, however, has been devoted to examining the kind of perceptual mechanisms that are at work in virtuous judgment. Michelon's and Van Domselaar's papers provide a detailed analysis of the perceptive aspects of virtue. Claudio

Michelon's paper, 'Lawfulness and the Perception of Legal Salience', puts forward an account of the perception of legally salient properties in which perception affords a preliminary ordering of the total information received, while allowing for the formation of a remainder that explains the peripheral legal perception experienced legal practitioners develop over time. The essay then explores the connection between perception thus conceived and moral and epistemic virtues, more specifically, lawfulness and practical wisdom. He is specially concerned with the Aristotelian claim, further developed by contemporary virtue theory, that all virtues must be, in some sense, unified

In her essay, 'The Perceptive Judge', Iris Van Domselaar defends an account of judicial perception according to which perception is a special ethical, other-regarding, character-dependent professional skill that is required for virtuous adjudication. Thick value concepts, argues Van Domselaar, play a prominent role in the kind of deliverances of the perceptual capacity that is characteristic of expert judges, which consist in an immediate, spontaneous and experiential kind of legal understanding. This is not to deny, however, the importance that explicit rules, principles, and reflection play in adjudication, alongside with judicial perception. Van Domselaar uses McEwan's novel, *The Children Act*, throughout the paper as an illustrative source. Thus, her paper also exemplifies an important methodological commitment of virtue theories, which take literature to be an important contributor to philosophical analysis.

Virtue approaches to adjudication call into question the primacy that rules and rule-application enjoy in standard approaches to legal reasoning. An ability to describe accurately the facts of the case, which requires the engagement of both imaginative and emotional capacities, is a mark of the virtuous judge, who always tests the applicability of the rule against the particular features of the case. The attention to the particulars that characterizes virtue approaches to adjudication is discussed in Del Mar's and Moreso's papers. Maksymilian del Mar in 'Common Virtue and Perspectival Imagination: Adam Smith and Common Law Reasoning' establishes a correlation between Smith's construction of the spectator and the use of perspectival devices in the common law. On Del Mar's interpretation, Smith's spectator embodies an ordinarily virtuous, culturally and historically situated observer, who, through the exercise of his imaginative capacity, carefully and patiently describes the particularities –including the affectivities- of the situation at hand. There are, argues Del Mar, important parallelisms between Smith's construction of the spectator and perspectival devices in common law, such as 'the right-thinking member of society', 'the reasonable person' or 'the person of ordinary prudence,' in that both endorse the perspective of common, middling, virtue, rather than a utopian construction of excellence. Del Mar's essay, like Annas', shows the potential of versions of virtue ethics other than the Aristotelian one to contribute to the development of virtue jurisprudence.

José Juan Moreso's essay, 'Reconciling Virtues and Action-Guidance in Legal Adjudication', develops an specificationist account of legal reasoning which aims at providing a middle way in between particularist approaches to legal reasoning and generalists ones. We may attain, claims Moreso, 'contextual universalism' by means of a five-step procedure the outcome of which is the formulation of rules that univocally solve all the cases of the universe of discourse. This specificationist view allows us, in Moreso's

view, to preserve the idea that legal justification is a matter of subsumption in a way that is, nonetheless, context-sensitive. Virtues play an important role in this process, in that the reliability of the five stage procedure depends on the virtues of the people engaged in the process, which are necessary in order to adequately describe the particulars of the case and determine the relevant properties. The role that virtues play in practical reasoning is, claims Moreso, similar to the way in which virtues contribute to the process of justifying our beliefs and achieving knowledge – an analogy that is explored in the last part of the essay. Moreso's suggestion that we may construct a virtue-account of legal justification on the basis of a virtue-account of epistemic justification is an instance of an interesting development that the virtue turn in philosophy has put in motion, namely, a rapprochement between epistemology and ethics, which has resulted in the production of exciting work that aims at exploring similarities and connections between the normativity of belief and the normativity of action.

Amalia Amaya's paper, 'The Virtue of Judicial Humility', also lies at the intersection between epistemology and ethics. In her paper, Amaya defends an egalitarian approach to humility according to which humility demands that judges do not regard the fact that they excel (and are therefore) better than others with regard to some features or qualities as evidence that they are unqualifiedly better or superior to others, most importantly, the parties and other actors involved in the process. This conception of judicial humility stands in sharp contrast with the prevailing conception of judicial humility that takes humility to be a matter of acknowledging one´s cognitive limitations, which favors an attitude of deference and restraint. After subjecting this conception of judicial humility as judicial restraint to criticism, the paper discusses some reasons why humility might be a valuable trait for judges to have and defends the value of humility on the grounds that it importantly fosters the realization of the ideal of fraternity. Amaya's essay may be viewed as a contribution, from the perspective of legal theory, to what is a growth area within virtue theory, namely, the investigation of individual virtues and their corresponding vices.

Finally, virtue theory has been applied not only to shed light on core issues in legal theory but also to several fields of substantive law. The two last papers, by Pritchard and Duff, contribute to examining the relevance of virtue theory to criminal law, which is, undoubtedly, one of the areas of the law that have been most extensively subjected to a virtue analysis. In his essay, 'Legal Reasoning, Good Citizens, and the Criminal Law', Anthony Duff argues that, if we are to find a proper place for criminal law in a democratic republic, legal reasoning should not be severed from the kind of reasoning in which ordinary citizens must engage. Thus, an account of citizen virtue, which is the focus of Duff's essay, turns out to be highly relevant for a theory of legal reasoning, alongside with an account of role-specific virtues of judges, lawyers or other legal decision-makers. Duff examines the virtues specific to the role of citizen in two contexts: the role that citizens play insofar as they are bound by (criminal) law and the role that they play as jurors. With regard to the first role, the main citizen virtue is that of law-abidance, which, argues Duff, rather than being mere obedience involves a thoughtful critical attitude towards the law. We are thus invited here to reflect further on the connections between law-abindingness and virtue, discussed earlier in Annas' and Brownlee and Child's papers, but with a particular focus on the criminal law system. As far as the role of jurors is concerned, Duffs rejects the view according to which the primary virtues of good jurors consist in deference to the judge

and the ability to appraise factual evidence. Instead, Duff claims that jurors' virtues flow from their role as citizens, who are called to be collaborators in the criminal law's enterprise of calling to public account those who violate their norms. This, argues Duff, has important implications for the way in which properly law-respecting jurors ought to deliberate as well as for the issue of jury nullification.

In 'Legal Risk, Legal Evidence, and the Arithmetic of Criminal Justice' Duncan Pritchard criticizes the prevalent, probabilistic, approach to determining the permissible extent of wrongful convictions in a criminal justice system and sets out a an alternative conception of the risk of being wrongful convicted that is primarily cast along modal rather than probabilistic lines. This modal conception of legal risk, argues Pritchard, has implications for a related debate in legal scholarship about the weight of evidence beyond the context of the criminal trial. A necessary condition on the evidence in both criminal and civil cases is that it ensures that the risk of either wrongful conviction or wrongful judgment of liability is not an easy possibility. Merely having evidence that makes it likely that the defendant is guilty or liable will not suffice to meet this condition. What is required in both criminal and civil liability cases is that the evidence exclude legal risk of the relevant kind. Pritchard's essay, like Moreso's and Amaya's, draw on virtue epistemology to cast light on issues in legal theory. However, while Amaya's paper endorses an Aristotelian, responsibilist approach to virtue epistemology, Pritchard's assumes a reliabilist strand of virtue epistemology, and Moreso explicitly accepts a mixed view, which combines reliability with responsibility.

Taken together these papers, whose initial drafts were discussed at the conference on 'Legal Reasoning, Virtue and Politics', hosted by Edinburgh University Law School, provide a clear picture of the on-going research in this very active field of legal theorizing. Each paper further advances one or more of the research agendas that have formed within virtue jurisprudence while also opening further avenues of inquiry, in such way that, the editors hope, they not only illustrate the potential of virtue jurisprudence to contribute to current legal scholarship, but also help to develop new directions of investigation in the field.